In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 884

ALFRED M. SHAFTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of the court of appeals (App. 15a-16a)[1] is not reported. The opinion of the district court (App. 1a-14a) is reported at 273 F.Supp. 152.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1968 (Pet. 1a-2a). The petition for

---

[1] "App." refers to the appendix to petitioners' brief in the court of appeals.

a writ of certiorari was filed on December 28, 1968. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the North Atlantic Treaty — Status of Forces Agreement provides the exclusive remedy for personal injury and death resulting from a collision in German territorial waters between a German vessel and a United States Naval vessel.

TREATY INVOLVED

Article VIII of the North Atlantic Treaty—Status of Forces Agreement of June 19, 1951, T.I.A.S. 2846, 4 U.S.T. [2] 1792, 1806-1808, provides in pertinent part as follows:

> 5. Claims * * * arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:
>
> *(a)* Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

(b) The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.

(c) Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.

(d) Every claim paid by the receiving State shall be communicated to the sending States concerned together with full particulars and a proposed distribution in conformity with sub-paragraphs *(e)* (i), (ii) and (iii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.

(e) The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs and paragraph 2 of this Article shall be distributed between the Contracting Parties, as follows:—

(i) Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent. chargeable to the receiving State and 75 per cent. chargeable to the sending State.

* * * *

(h) Except in so far as sub-paragraph *(e)* of this paragraph applies to claims covered by paragraph 2 of this Article, the pro-

visions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply.

STATEMENT

The petitioners are a surviving German crew member and the next of kin of six crew members (five German nationals and one Spanish national) of a German coastal vessel, the M/S DIRK. The vessel sank in February 1964 in the territorial waters of the Federal Republic of Germany after a collision with the USNS BLUE JACKET. The six crew members perished as a result of the collision; the surviving crew member suffered injuries (App. 1a).

The USNS BLUE JACKET was a naval cargo ship transporting supplies to the United States armed forces stationed in the Federal Republic of Germany pursuant to the North Atlantic Treaty ("NATO")[2] (App. 9a). The North Atlantic Treaty—Status of Forces Agreement, T.I.A.S. 2846, 4 U.S.T. [2] 1792 ("NATO-SOFA"), which defines the rights, privileges and obligations of the military forces of one NATO state stationed in or passing through the territory of another NATO state, contains a comprehensive scheme

[2] T.I.A.S. 1964, 63 Stat. [2] 2241. The Federal Republic of Germany acceded to NATO by a protocol on October 23, 1954, T.I.A.S. 3428, 6 U.S.T. [5] 5707, and to NATO-SOFA by a supplementary agreement on August 3, 1959, T.I.A.S. 5351, 14 U.S.T. 531.

for the adjudication and settlement of claims for damages caused by the members of the United States forces in the territory of the Federal Republic of Germany. Essentially, such claims must be asserted, in the first instance, before an administrative agency of the Federal Republic; review of the administrative decision can be had in the German law courts. If a claimant is successful, the Federal Republic pays the administrative award or judgment, but the United States ultimately reimburses the Federal Republic for 75 percent of the amount so paid.[3]

Following the collision, all of the petitioners filed administrative claims against the Federal Republic with the appropriate German administrative agency (the "Defense Cost Office" in Bremen) in accordance with NATO-SOFA (App. 7a). The German agency denied the claims, holding that the collision was caused solely by the faulty navigation of the German vessel *(ibid.)*. None of the petitioners appealed these adverse decisions, as permitted by German law, and they became final (App. 8a).

Thereafter, the petitioners instituted the present suit against the United States under the Public Vessels Act, asserting the same claims which had been earlier rejected by the German Defense Cost Office. On the government's motion, the district court dismissed the suit on the ground that the comprehensive

---

[3] 10 U.S.C. 2734a authorizes the Secretary of Defense to pay to foreign governments the agreed pro rata share of the cost of claims settled by those foreign governments and arising from damages caused by members of the United States armed forces present in such foreign countries pursuant to NATO.

claims provisions of NATO-SOFA provided the exclusive remedy for these death and personal injury claims (App. 6a). The court of appeals affirmed *per curiam* (App. 15a).

ARGUMENT

The petition raises the single question whether the courts below correctly dismissed the petitioners' suit under the Public Vessels Act, 46 U.S.C. 781, for personal injury and death on the ground that their sole remedy was a proceeding under the Status of Forces Agreement in Germany. It is clear that the claims which petitioners allege are cognizable under the SOFA. Paragraph 5*(h)* of Article VIII thereof provides:

> [With immaterial exceptions,] the provisions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, *other than claims for death or personal injury* to which paragraph 4 of this Article does not apply.[4] [Emphasis added.]

The petitioners contend (Pet. 10-19), however, that NATO-SOFA ought not to be interpreted to vest exclusive jurisdiction in the state where our forces are operating over maritime personal injury and death claims involving a United States Naval vessel. Relying on the facts that NATO-SOFA excludes maritime

---

[4] Paragraph 4, not pertinent here, contains a mutual waiver of claims by the signatory states for injuries suffered by, or deaths of, members of their military forces.

property claims from the coverage of the claims article, and on certain portions of the negotiating history of the treaty, petitioners urge that the courts should read paragraph 5*(h)* of Article VIII of NATO-SOFA as excluding all maritime claims.

The language of the treaty, however, refutes petitioners' position. The necessary implication of the statement in paragraph 5*(h)* that its provisions shall not apply to claims arising out of ship operations "other than claims for death or personal injury" is that they do cover the latter category. Moreover, as the court below pointed out (App. 5a), petitioners' proposed reading of paragraph 5*(h)* would also prevent uniform treatment of compensation claims arising in a given NATO country—which the treaty was designed to accomplish [5]—and would encourage forum shopping.[6] In short, as the district court stated (App. 5a-6a):

> There is no doubt that the later provisions of NATO-SOFA are to be harmonized so far as possible with those of the Public Vessels Act. It seems equally clear that the specific and detailed remedial apparatus under the later treaty should

---

[5] See S.Exec.Rep. No. 1, 83d Cong., 1st Sess., pp. 13-14 (1953).

[6] Petitioners' further claim (Pet. 7-9) that the Constitution precludes a repeal of an Act of Congress by a subsequent treaty. Article VI of the United States Constitution provides, however, that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land * * *." See also *Hijo* v. *United States*, 194 U.S. 315, 325; *Z.&F. Assets Realization Corporation* v. *Hull*, 114 F.2d 464, 470-471 (C.A.D.C.), affirmed, 311 U.S. 470.

be deemed to substitute *pro tanto* for the general consent to suits under the statute. In giving its assent to NATO-SOFA, the Senate noted specifically both the benefits and the burdens of the jurisdictional agreement. * * * And it was recognized that the United States was undertaking the same jurisdictional burdens, and procuring the same benefits, for American citizens injured by foreign NATO forces stationed in this country.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

MORTON HOLLANDER,
BRUNO A. RISTAU,
Attorneys.

FEBRUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 331865 456